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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-648

MADELINE WOLFE,

Petitioner

vs.

METROPOLITAN DADE COUNTY
and
ASHTON TYLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND THE COURT OF APPEALS, THIRD DISTRICT STATE OF FLORIDA

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INDEX

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2-3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3-4
STATEMENT OF THE FACTS	4-6
REASONS FOR GRANTING THE WRIT	7-11
CONCLUSION	12

APPENDIX

FINAL JUDGMENT	App. 1
OPINION, DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT	App. 5
ORDER DENYING REHEARING, DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT	App. 8
ORDER, SUPREME COURT OF FLORIDA	App. 9

CITATIONS

PAGE

CONSTITUTION

Section 1, Amendment 14, U.S. Constitution 2, 3

STATUTES

28 USC 1257(3) 2
42 USC 1983 ..... 2, 3, 6
Civil Rights Act of 1964, Title VII 7

ORDINANCES

Section 2.40, Metropolitan Dade County Code 4
Section 2.42, Metropolitan Dade County Code 4

RULES

Rule 19, Supreme Court Rules 2

CASES

Arrington v. Massachusetts Bay Transportation Authority, 306 F. Supp. 1355 at 1358 9
Calhoun v. Doster, 324 F. S. 736 at 743 8
Griggs v. Duke Power Co., 401 U.S. 424, 28 L.Ed. 2d 158, 91 S. Ct. 849 ..... 3, 7, 8 10, 12
Metropolitan Dade County, et al, v. Wolfe, 274 So. 2d 584 2
Weber v. Aetna Casualty and Surety Company, 406 U.S. 164, 31 L.Ed. 2d 768, 92 S. Ct. 1400 10
Whitner v. Davis, C.A. Wash, 1960, 410 F. 2d 24 at 30. 8

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND THE COURT OF APPEALS, THIRD DISTRICT STATE OF FLORIDA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida entered on the 30th day of July, 1973, and of the District Court of Appeal of Florida, Third District, entered on the 27th day of February, 1973, in the above case.

OPINIONS BELOW

The opinion of the District Court of Appeal, Third District, is reported in 274 So. 2d 584, and the opinion of the Florida Supreme Court has not yet been reported. Copies of said opinions are attached hereto in the Appendix to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) and Rule 19 of the Supreme Court Rules in that in the courts below Petitioner challenged certain employment practices of Metropolitan Dade County, Florida, a State governmental unit, as being in violation of Section 1, Amendment 14, of the United States Constitution, and Title 42, U.S.C., Section 1983. The courts below decided a federal question of substance not specifically determined by this Court and decided it in a way not in accord with applicable decisions of this Court.

QUESTIONS PRESENTED

Metropolitan Dade County adopted a merit system of employment and authorized its Personnel Director to adopt reasonable regulations thereunder. The Personnel Director adopted a table of maximum weights as applied to heights for all employees and prospective employees. Petitioner was refused employment on the grounds that she was overweight, even though the County admitted that the weight regulation was not related to the job for which she applied; she had performed the

same job successfully several years before, when she was at or above her present weight; and she was then in good health.

The trial court held that the weight regulation violated 42 U.S.C. 1983 and ordered the County to hire Petitioner. The District Court of Appeal, Third District, held that even though the regulation was not "job related" it had a "business purpose" and that it was authorized by this Court in the case of Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849. The Florida Supreme Court declined jurisdiction.

The questions presented to this Court are:

1. Are maximum weight limits for prospective county employees, which admittedly have no relationship to the ability of the prospective employee to perform the job, void and unendorceable because they violate the equal protection clause of Section 1, Amendment 14, United States Constitution?

2. Are such weight limits prohibited by 42 U.S.C. 1983?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Constitutional provisions and Statutues involved are as follows:

Section 1, Amendment 14, United States Constitution: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. 1983. Civil Action for Deprivation of Rights. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the

United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 2.40, Metropolitan Dade County Code:
"There is created a merit system of personnel administration for the County, which system shall be based on merit principles and scientific methods governing the selection, appointment, promotion, transfer, lay-off, removal, discipline, and welfare of employees of the county, and other incidents of county employment. All appointments and promotions in the county merit system shall be made solely on the basis of merit and fitness, to be ascertained, so far as possible, except in certain cases, by competitive examination."

Section 2.42, Metropolitan Dade County Code reads in part:
"The director of the personnel department shall prepare and submit . . . proposed rules for the classified service . . . Such rules shall have the force and effect of law when adopted by a majority of the county commissioners and the other elected officials whose employees are affected by this division . . . The rules shall provide: . . .
(7) For the rejection of candidates who fail to comply with reasonable requirements of the director in regard to such factors as age, physical condition, training and experience . . . "

STATEMENT OF THE FACTS

Madeline Wolfe had been employed by the County as a Communication Operator in the Fire Alarm Division of the Fire

Department from April 6, 1964 to June 3, 1968. In all of her Employee evaluation reports she was rated as satisfactory or outstanding in all categories (Record, Pages 2,7,8, Volume II, Page 22, Exhibit 1). She left her employment to accompany her husband who was moving to another state.

Thereafter Mrs. Wolfe and her husband returned to Florida and she reapplied for her former position. She was reemployed subject to a physical examination and a probationary period and began work on February 1, 1971 (Record, Pages 2,8, Volume II, Pages 25, 26, Exhibit 4).

The duties of the job for which Mrs. Wolfe was employed consist primarily of answering fire alarm telephone calls and relaying the calls to the proper units (Volume II, Page 28). The County stipulated that:

> " . . . there is no direct relationship between Mrs. Wolfe's weight and her ability to perform the job that she had applied for." (Volume II, Pages 28-29).

She weighed the same in 1971 when she applied for reemployment as she had weighed in 1964-1968 when she was employed. There are other persons presently doing the same job who are as overweight or more overweight than she is (Volume II, Pages 32-38).

Notwithstanding the above, the County terminated Mrs. Wolfe's employment for the sole reason that she exceeded their table of weight requirements (Volume II, Page 29, Defendant's Exhibit A, Pages 1,13). Although a waiver could have been requested, and waivers have been granted for other employees, no waiver was requested for Mrs. Wolfe. (Volume II, Page 43).

Mrs. Wolfe filed suit against the County for a declaration that the weight requirements were arbitrary, unreasonable, and unconstitutional. At the trial she presented evidence substantiating the above facts and also presented the testimony of Dr. Edward L. Reid, II, who had given Mrs. Wolfe a thorough physical examination and who had examined the record of the physical examination given her by Metropolitan Dade County. He stated that over-weight was merely one factor to be considered in an over-all picture of health (Volume II, Page 13), along with blood pressure and hypertension, as well as heredity, and that in all of these other factors, Mrs. Wolfe's health was excellent (Volume II, Pages 7, 13-14). He stated that he had read the job description of the type of job Mrs. Wolfe had applied for and had discussed her duties with her and that there was no reason to disqualify her from performing this job so far as her weight was concerned (Volume II, Pages 7-8).

Other than a proffer of testimony by an unqualified witness (Volume II, Pages 18-20) the County and its Personnel Director offered no justification for the weight regulations. On the contrary, they stipulated that the weight requirements were not job related.

The trial court held that the weight regulations were not within the scope of the authority of the Director of the Personnel Department or the Personnel Advisory Board and were specifically prohibited by 42 U.S.C. 1983. The County took an Appeal to the Court of Appeals, Third District, which reversed on the grounds that the weight requirements were "job related", "business related", and "grounded on business necessity", even though there was no evidence in the record to sustain such a finding.

The Florida Supreme Court declined jurisdiction.

REASONS FOR GRANTING THE WRIT

It is apparent that the opinion of the District Court of Appeal in this case is based upon a misreading of the case of Griggs v. Duke Power Company, 401 U.S. 424, 28 L.Ed 2d 158, 91 S. Ct. 849. In that case the United States Supreme Court considered the effect of the Civil Rights Act of 1964, Title VII, on general intelligence tests administered to groups of employees of a privately owned power company who sought promotion to certain positions. In describing how the Act and the Constitution should be applied, the Court said:

"The touchstone is business necessity." (401 U.S. at 431; 91 S. Ct. at 853).

The Court of Appeals below interpreted this to mean that:

" . . . Such a regulation (as the one concerning weight) is proper because based on business necessity (and) **it is not necessary that the physical condition inhibited by the regulation be one which presently would impair the performance of the employee in the job sought or involved.**" (Emphasis added).

That this is a misreading of the Griggs decision is apparent not only from the facts of the Griggs case, but also by the statement of the Supreme Court made in 401 U.S. at 436, 91 S. Ct. at 856, that:

"What Congress has forbidden is giving these devices and mechanisms controlling force unless they are **demonstrably a reasonable measure of job performance . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.**" (Emphasis added).

The Supreme Court found that the intelligence tests administered by the Duke Power Company had no relationship to the performance of the specific job or the next succeeding position or related future promotions (401 U.S. at 432, 91 S. Ct. at 854). Use of the test was prohibited.

When such discrimination is used by a governmental agency to deny public employment, the matter becomes a Constitutional rather than a statutory matter.

The constitutional issue involved in this case was concisely stated and answered in the case of Whitner v. Davis, C A Wash., 1960, 410 F. 2d 24 at 30:

> "Defendants also contend that plaintiff has failed to state a claim under the Civil Rights Act because there is no constitutional right to public employment.
>
> While there may be no constitutional right to public employment as such, there is a constitutional right to be free from unreasonably discriminatory practices with respect to such employment (Citing Cases)."

Another case recognizing the same principal arose out of harassment of an Alabama National Guard Officer who refused to contribute to an illegal campaign fund. The District Court in Calhoun v. Doster, 324 F.S. 736, said at 743:

> "(T)he theory that public employment which may be denied altogether may be subject to any conditions regardless of how unreasonable, has been uniformly rejected (Citing cases). **To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities."** (Citing cases). (Emphasis added).

In the case of Arrington v. Massachusetts Bay Transportation Authority, 306 F. Supp. 1355, the Transportation Authority, a public body, gave general aptitude test batteries to prospective bus drivers and toll collectors. These tests had no reasonable relationship to job performance. The Court there said: (Page 1358)

> **"Whenever state action is creative of a classification among its citizens such that burdens or benefits flow unequally, that classification is constitutionally suspect. The legitimacy of the objectives producing the classification must be adequately justified and of sufficient importance to overcome the evils of the inequality engendered (Citing Cases). It is not enough that the factors producing the classification and the consequent inequality are themselves objectively neutral and without a background of even latent discriminatory purpose; when the effect is to deprive some citizens of rights that should be equally available to all, then there must be a compelling justification (Citing Cases). Thus when a seemingly neutral or objective hiring standard, such as a generalized aptitude test fairly administered, produces such factually discriminatory results with respect to important rights of equal opportunity for employment by an agency of the state, then the demands of equal protection under the Fourteenth Amendment warrant judicial inquiry into the justification for that criterion."**
>
> "Using an aptitude test to determine eligibility for employment or the order of hiring is certainly justified **if there is a relationship between the aptitudes tested and the demands of the work to be performed.** It is not unreasonable to prefer those with superior ability to score well on a test if that means that they are also more likely to do well on the job . . . " (Emphasis added).

> "However, if there is no demonstrated correlation between scores on an aptitude test and ability to perform well on a particular job, the use of the test in determining who or when one gets hired makes little business sense. When its effect is to discriminate against disadvantaged minorities, in fact denying them an equal opportunity for public employment, then it becomes unconstitutional, unreasonable and arbitrary (Citing Cases)." (Emphasis added).

The rule of law to be gleaned from these cases and the cases they cite, and the cases that follow them, is clear. A State and its agencies may not discriminate against its citizens in its hiring practices unless the discriminatory regulations bear a reasonable relationship to the performance of the particular job or jobs to which they apply. This is a part of a broader rule that:

> "The tests to determine the validity of state statutes under the Equal Protection Clause (are) that a statutory classification bear . . . some rational relationship to a legitimate state purpose." Weber v. Aetna Casualty and Surety Company 406 U.S. 164 at 172, 31 L.Ed. 2d 768, 92 S.Ct. 1400.

The burden of proof of this rational relationship is upon the employer. Griggs v. Duke Power Company, 401 U.S. at 432, 91 S. Ct. at 854.

When this standard is applied to the case at bar it is apparent that the Third District Court of Appeals erred and the Circuit Court was correct. The County stipulated:

> " . . . that there is no direct relationship between Mrs. Wolfe's weight and her ability to perform the job that she had applied for." (Volume II, Pages 28 and 29).

Dr. Reid testified that the weight-height ratio, standing alone, bore no relationship to Mrs. Wolfe's good health; that other factors were required before over-weight became a health problem; that none of these factors appeared in Mrs. Wolfe's physical condition; and that her health was good. (Record, Volume II, Pages 6 to 14). Mrs. Wolfe had successfully performed the same job from 1964 to 1968 (Volume II, Page 21) when she was at the same or higher weight than when she applied for re-employment (Volume II, Page 32). Finally, others were then employed on the same job who were as overweight or more overweight than Mrs. Wolfe. (Volume II, Page 32, 34 to 38).

Other than its Stipulation, the County offered no evidence as to any rational relationship between its regulation and the performance by Mrs. Wolfe of the job for which she sought employment.

The County's regulation is therefore arbitrary and unreasonable and void because it contravenes the Equal Protection clauses of the United States and Florida Constitutions.

CONCLUSION

The District Court of Appeal, Third District, misread the Griggs case. The touchstone of the constitutionality of discriminatory regulations for Government employment is not just "business necessity", it is "**job related** business necessity". The weight-height ratios used by Dade County are not "job related" to the employment sought by Appellant. The regulations therefore are unconstitutional. This Court should issue a Writ of Certiorari and reinstate the Judgment of the Circuit Court, directing the County to reemploy Mrs. Wolfe.

RESPECTFULLY SUBMITTED,

ROBERT M. BRAKE
Attorney for Appellant
1830 Ponce de Leon Boulevard
Coral Gables, Florida 33134

APPENDIX

(CAPTION OMITTED)

FINAL JUDGMENT

THIS CAUSE came on before me for trial without jury. The Court heard the testimony of the parties, considered the documents introduced into evidence and heard and considered the argument of counsel.

FINDINGS OF FACT

1. The Defendant, METROPOLITAN DADE COUNTY is a political subdivision of the State of Florida having Home Rule powers. The County has established a Personnel Department and provided for a merit system of personnel administration for the County providing for appointments and promotions to be made solely upon the basis of merit and fitness.

2. The Defendant, ASHTON TYLER is Personnel Director of METROPOLITAN DADE COUNTY. Under the County Code, he is authorized to submit to the Personnel Advisory Board rules for the classified service providing, among other things, for the rejection of candidates who fail to comply with reasonable requirements of the Director in regard to such factors as age, physical condition, training and experience.

3. From April, 1964 to June, 1968, Plaintiff was employed as a Communication Operator in the Fire Alarm Division of the Fire Department of Dade County. In her employee Evaluation Reports she was rated as "Satisfactory" or "Outstanding" in all categories.

4. In June, 1968, Plaintiff left the employment of the County and moved to California. Thereafter she returned to Miami and applied for re-employment as a Communication

Operator. In January, 1971, Plaintiff was re-employed as a Probationary Employee and reported for work on February 1, 1971. One of the conditions of Plaintiff's Probation was that she pass a physical examination to be given her by the County. Plaintiff took the examination and was informed that the County had adopted minimum and maximum weight categories for all of its employees, and that she was fifty-three pounds over-weight. She was informed that although the County Code provided for waivers, the County's policy was not to grant such waivers unless there was no one else capable of filling the position to be filled by the over-weight person. Although the County Code provides that a Probationer may be discharged without charges or hearing, Plaintiff was informed that she was being discharged for the sole reason that she was fifty-three pounds overweight.

4. The Defendants admitted that there was no reasonable relationship between the weight requirements adopted by the Personnel Department and the performance of the duties of a Communications Operator, which consists primarily of sitting at a telephone console to answer telephone calls and to transfer the calls to the proper department. Such work is now and has in the past been satisfactorily performed by personnel who weigh in excess of the weight requirements of the County, and in fact was satisfactorily performed by Plaintiff for more than four years during her prior employment by the County when she weighed more than she presently does.

5. Plaintiff has established by competent medical testimony that at all times material to this cause she has been, and is, in good health, and that her over-weight does not have deleterious effect upon her health or upon her ability to perform the job in question.

FINDINGS OF LAW

1. Since obesity, standing alone, is not reasonably or rationally related to the ability to perform the duties of Communications Operator, the weight regulations adopted by the Personnel Department of Dade County, for the position of Communications Operator are not within the scope of the authority of the Director of the Personnel Department or the Personnel Advisory Board and are specifically prohibited by 42 U.S.C. 1983.

2. Where a person has been discriminated against in violation of 42 U.S.C. 1983, a Court may award appropriate relief, including back pay. (Sardinas et al v. Metropolitan Dade County, etc. U. S. District Court, Southern District of Florida No. 71-904).

It is therefore,

ORDERED AND ADJUDGED as follows:

1. The Defendant, METROPOLITAN DADE COUNTY, shall hire the Plaintiff, MADELINE WOLFE, for the position of Communications Operator in the Fire Alarm Division of the Fire Department of Metropolitan Dade County.

2. Plaintiff is hereby awarded back pay in an amount equal to the difference between what Plaintiff in fact earned from February 18th, 1971 to the entry of this Order and which she would have earned if employed as a Communication Operator during said period.

3. The Court retains jurisdiction of this cause for the purpose of determining the amount of back pay due to Plaintiff from Defendant, METROPOLITAN DADE COUNTY, and for the taxation of costs on proper motions therefor.

DONE AND ORDERED at Miami, Dade County, Florida, this 22 day of May, 1972.

/s/ Arthur E. Huttoe
CIRCUIT JUDGE

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT JANUARY TERM, A.D. 1973
CASE NO. 72-783

Opinion filed February 27, 1973.

(BALANCE OF CAPTION OMITTED)

PER CURIAM.

This appeal is by the defendants below, from an adverse judgment directing Dade County to employ the appellee for the position of communications operator in the fire alarm division of the fire department of the county, and awarding her back pay from the time of her dismissal. We find error and reverse.

The status of the appellee, at the time she was dismissed, was that of a probationary employee. Under the Code of Metropolitan Dade County, 2-42, and the Personnel Rules of the County, an employee in a probationary status may be dismissed without the need for there to be good cause, and without the right to a hearing. Cf. Byrne v. Cato, 158 Fla. 391, 28 So. 2d 687.

Here the reason assigned for the dismissal of the appellee, although the giving of a reason was not necessary for validity of dismissal of one in her employment status, was that she was some 53 pounds overweight, according to the weight regulation of the county which was applicable. As a result thereof she was unable to pass satisfactorily a physical examination upon which qualification for employment was dependent.

The trial court was of the view that fixing of such a weight regulation, as a condition of employment, was a discrimination against a person in violation of 42 U.S.C. 1983. We cannot

agree. The regulation relating to weight or overweight, like other health requirements, may properly be made a condition of employment, since there is reasonable basis to conclude that one who is obese or overweight, as for other health conditions, is thereby more likely to become disabled during employment, to the detriment of the county financially and otherwise. As such, the regulation can be said to be grounded on business necessity. See Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L.Ed.2d 158, 164; Rowe v. General Motors Corporation, 5 Cir. 1972, 457 F.2d 348, 354. For example, in Sardinas v. Metropolitan Dade County, decided by the United States District Court for the Southern District of Florida, Miami Division (No. 71-904, unreported) the Court stated, as one of the conclusions of law therein, "The defendant may adopt and continue to adopt weight requirements since they are job related. Such business related requirements are not prohibited by 42 U.S.C., Section 1983. Griggs v. Duke Power Co., 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849."

The trial court based the judgment on the additional ground that the county's weight regulation was not job related, in that "her overweight does not have deleterious effect upon her health or ability to perform the job in question," The appellee contends that ground is meritorious and is sufficient support for the judgment. The appellant argues and we agree, that if such a regulation is proper because based on business necessity it is not necessary that the physical condition inhibited by the regulation be one which presently would impair the performance of the employee in the job sought or involved. Thus, in this connection the Supreme Court of the United States in Griggs said: "The touchstone is business necessity."

In this case there is no claim or indication that this regulation, which is applicable to all alike, had a discriminatory or other invidious purpose.

For the reasons assigned the judgment is reversed and the cause is remanded to the circuit court with direction to enter an order dismissing the complaint.

Reversed and remanded with direction.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT JANUARY TERM, A.D. 1973
WEDNESDAY, APRIL 4, 1973
CASE NO. 72-783

(BALANCE OF CAPTION OMITTED)

Counsel for appellee having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

/s/ William Kent
Clerk District Court of
Appeal, Third District

cc: Robert M. Brake
Alan T. Dimond

/h

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT IN AND FOR DADE COUNTY, FLORIDA)

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1973
MONDAY, JULY 30, 1973
CASE NO. 43,761

(BALANCE OF CAPTION OMITTED)

Appellees' suggestion of lack of jurisdiction is granted and it is ordered that the appeal be and the same is hereby dismissed.

CARLTON, C.J., ROBERTS, ERVIN, ADKINS and BOYD, JJ., concur

A True Copy

TEST:

/s/Sid J. White
Sid J. White
Clerk Supreme Court.
By: /s/ Sara Gainez, D.C.

cc: Honorable William P. Carter, Clerk
Honorable Richard P. Brinker, Clerk
Honorable Arthur E. Huttoe, Judge
Honorable Robert M. Brake
Honorable Alan T. Dimond

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MEMORANDUM OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND THE COURT OF APPEALS, THIRD DISTRICT STATE OF FLORIDA

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MIAMI REVIEW — 371-4853 — 377-3721

In the Supreme Court of the United States

October Term, 1973

No. 73-648

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MEMORANDUM OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND THE COURT OF APPEALS, THIRD DISTRICT STATE OF FLORIDA

MEMORANDUM OPPOSING CERTIORARI

Respondent Metropolitan Dade County, et al., represents to the Court as follows:

1. The opinion sought to be reviewed was rendered and filed on February 27, 1973 by the District Court of Appeal of Florida, Third District (Petitioner's App. 5). On April 4, 1973, the District Court of Appeal denied rehearing (Petitioner's App. 8).

2. Petitioner seeks this Court's jurisdiction under the auspices of 28 U.S.C.A., Section 1257 (3) but did not file a petition until 192 days after the decision sought to be reviewed was rendered by the highest court of the State of Florida in which a decision could be had.

3. The Supreme Court of Florida, in which Petitioner sought jurisdiction, did *not* decline to exercise discretionary jurisdiction, but rather held it did *not* have jurisdiction[1] (Petitioner's App. 9). See also *Armstrong v. City of Tampa*, Fla. 1958, 196 So.2d 407.

4. Under Florida law, the District Court of Appeal became the highest court from which decision could be had. *Williams v. Florida*, Fla. 1970, 90 S.Ct. 1893, 399 U.S. 78, 26 L.Ed.2d 446, 449, note 5; See also *Ansin v. Thurston*, Fla.1958, 101 So.2d 808, 810.

---

[1]A copy of Appellees' suggestion of lack of jurisdiction, filed in the Supreme Court of Florida, is attached as an Appendix hereto. It was grounded *solely* upon the Court's obvious lack of jurisdiction.

5. The petition was filed on October 13, 1973, more than 90 days since the opinion was rendered and rehearing denied, and the period for applying for a Writ of Certiorari has not been extended by a Justice of this Court (28 U.S.C.A., Section 2101 (c) and Rule 22 of this Court).

Therefore, it appears that Petitioner's application for a Writ of Certiorari is out of time and should be denied.

Respectfully submitted,

STUART SIMON
Dade County Attorney
1626 Dade County Courthouse
Miami, Florida

By ALAN T. DIMOND

Alan T. Diamond
Assistant County Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum Opposing Petition for Writ of Certiorari to the Supreme Court of the State of Florida and the Court of Appeals, Third District, State of Florida was furnished by mail this 15 day of November, to: Robert M. Brake, Esquire, 1830 Ponce de Leon Blvd., Coral Gables, Florida.

ALAN T. DIMOND

Assistant County Attorney

APPENDIX

APPENDIX

[TITLE OMITTED]

APPELLEES' SUGGESTION OF LACK OF JURISDICTION

Appellee, Metropolitan Dade County, files this its Suggestion of Lack of Jurisdiction and says:

The Florida Appellate Rules, Rule 4.5 (c) (6) provides, in pertinent part, as follows:

> "(6) From District Court to Supreme Court. Where any decision of a district court of appeal (1) affects a class of constitutional or state officers, or (2) passes upon a question certified by such district court to be of great public interest, or (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decision."

The instant appeal comes from the District Court of Appeal, Third District. Appellant's brief raises but one jurisdictional basis: that the Court of Appeals construed controlling provisions of the Florida and United States Constitutions. The appeal does not affect, we submit, a class of constitutional officers; the appeal cites no question certified; and the appeal cites no case in conflict with the decision of the District Court.

The Appellant's brief argues only an improper application of the equal protection and due process cases. These points were considered initially in the Circuit Court and

reconsidered by the District Court of Appeals. Rule 2.1 (b) (5) provides, in pertinent part, as follows:

> "(b) Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon the validity of a state statute, a federal statute or treaty, or initially construing a controlling provision of the Florida or federal Constitution. The Supreme Court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, and may issue writs of certiorari to commissions established by law." (emphasis added)

Appellee respectfully suggests that the record in this case fails to support Supreme Court jurisdiction.

First, it is well established that the Constitution's due process and equal protection clauses are always applied, but rarely construed. Here there is a simple application of the Constitution rather than a construction of those clauses. In the Armstrong v. City of Tampa case (Fla., 1958) 106 So.2d 407, the court differentiated between the verbs "to construe" and "to apply" when it defined the former as to "explain, define or otherwise eliminate existing doubts arising from the language or terms of the Constitutional provision". As the court said, at 409:

> "We agree with those courts which hold that in order to sustain the jurisdiction of this court there must be an actual construction of the constitutional provision. That is to say, by way of illustration, that the trial judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. It is not sufficient merely that the trial judge examine into the facts of a particular case and then apply a recognized, clear-cut provision of the Constitution." (emphasis added)

That the court applied a recognized clear-cut provision of the Constitution to the facts of this case is clear. The court held further that:

> "To convey jurisdiction to this court by direct appeal it is necessary that the trial judge actually construe or interpret a section of the Constitution and then apply his construction to the factual situation presented to him." (at page 410)

The gravamen of the District Court's decision is as follows:

> "The trial court was of the view that fixing of such a weight regulation, as a condition of employment, was a discrimination against a person in violation of 42 U.S.C. §1983. We cannot agree. The regulation relating to weight or overweight, like other health requirements, may properly be made a condition of employment, since there is reasonable basis to conclude that one who is obese or overweight, as for other health conditions, is

thereby more likely to become disabled during employment, to the detriment of the county financially and otherwise. As such, the regulation can be said to be grounded on business necessity. See Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158, 164; Rowe v. General Motors Corporation, 5 Cir. 1972, 457 F.2d 348, 354." Metropolitan Dade County v. Wolf, (Fla.App. 1973, 274 So.2d 584)

There is clearly no construction of the applicable constitutional clauses by the District Court. There is an application of the equal protection and due process clauses. Thus, the Armstrong case, supra, holds that the Supreme Court lacks jurisdiction unless there is construction of a controlling provision.

Second, even assuming arguendo a construction of the applicable clauses by the District Court, we submit, there is not an initial construction of a controlling provision of the Florida or federal Constitution. The Circuit Court first (initially) passed directly upon the issue. Then the Court of Appeals reversed, thus passing for the second time on the issue.

This Court held in Callendar v. State, (Fla. 1966) 188 So.2d 529 that:

> ". . . insofar as appellate review of decisions of the several district courts of appeal is concerned we have authority to entertain an appeal of a decision of one of those courts only if the decision either (1) initially (for the first time in the cause) passed directly upon the validity of a state or federal statute, or (2) construed a

controlling provision of either the state or federal constitution. For meaning of "construing" a constitutional provision as used in our constitution see Armstrong v. City of Tampa, Fla. 1958, 106 So.2d 407. We have consistently interpreted our constitution to deny this Court authority to entertain an appeal from an order of a district court unless such order either passed upon the validity of a statute or construed a constitutional provision. Evans v. Carroll, Fla. 1958, 104 So.2d 375; State ex rel. Emanuel v. Cooper, Fla. 1963, 152 So.2d 471." (emphasis added)

This could be the third consideration of the same issue.

We are aware that this Court may treat appeals improvidently brought as petitions for certiorari. However, since this decision neither affects a class of state officers nor conflicts on the same point of law with a previous decision of this Court or of another Court of Appeal, it does not fall within this Court's certiorari jurisdiction.

We submit and suggest respectfully that this appeal should be dismissed for lack of appellate jurisdiction.

STUART SIMON
Dade County Attorney
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Miami, Florida 33130

By: _____
Alan T. Dimond
Assistant County Attorney

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-648

MADELINE WOLFE,

Petitioner

vs.

METROPOLITAN DADE COUNTY
and
ASHTON TYLER,

Respondent.

ERRATA

Page Four, Paragraph One,
Lines Nine to Eleven, should read,

"could be reviewed by Certiorari
or Appeal treated as Certiorari,"

Respectfully submitted,

ROBERT M. BRAKE
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1830 Ponce DeLeon Boulevard
Coral Gables, Florida

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PETITIONER'S REPLY BRIEF

ROBERT M. BRAKE
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33134

Respondents offer only one ground challenging the issuance of the Petition, namely, whether this Appeal was timely filed. To support the timeliness of this Petition Petitioner shows unto this Honorable Court as follows:

1. This Court has consistently held that it is necessary for a Petitioner to exhaust his State remedies, including the taking of an Appeal or the filing of a Petition for Certiorari to a State Supreme Court from a state intermediate Appellate Court (Stratton v. Stratton, 239 U.S. 55, 36 S. Ct. 26, 60 L. Ed. 142). This rule is followed even when the jurisdiction of the state's final Court of Appeal is discretionary (Andrews v. Virginian R.Co., 248, U.S. 272, 39 S. Ct. 101, 63 L. Ed. 236), since it is

> ". . . the existence of the power, and not the considerations moving to its exercise (which is) the criterion by which to determine whether the judgment of the trial court was final. . ."
> (39 S. Ct. at 102).

In such cases, the time for filing a Petition for Certiorari in this court runs from the date when the jurisdiction of the state's highest court was refused (American Railway Express Co. v.

Levee, 263 U.S. 19, 44 S. Ct. 11, 68 L. Ed. 140). In such a case the Writ is directed ultimately to the intermediate Court of Appeal. (Callendar v. State, 383 U.S. 270, 86 S. Ct. 924).

2. Florida's final Appellate Court is its Supreme Court and the decisions of the District Courts of Appeal may be reviewed, under certain circumstances, by the Supreme Court.

The United States Supreme Court asked the Florida Supreme Court to outline the finality of Florida's Appellate proecedures, pursuant to Rule 4.61, Florida Appellate Rules, in the case of Dressner, et al v. City of Tallahassee, 375 U.S. 136, 84 S. Ct. 235, 11 L. Ed. 2d, 208. In that case, an appeal from a Municipal Court to a Circuit Court was involved. The Florida Supreme Court affirmed that further review could be had by Certiorari to the District Courts of Appeal and then added (164 So. 2d at 212):

> [12, 13] We contribute an additional observation regarding a possible review of the decision of the Florida District Court of Appeal if its jurisdiction had been properly invoked in the instant case. Under Florida constitutional provisions a decision of the District Court of Appeal is reviewable on certiorari granted by the Florida Supreme Court in the event that such decision conflicts on the same point of law with a prior decision of the Supreme Court or another District Court of Appeal. Such decision is reviewable by the Florida Supreme Court if it initially construes a con-

> trolling provision of the state or federal constitution or initially passes upon the validity of a state or federal statute or treaty. To this extent complete exhaustion of Florida's appellate processes would comprehend ultimate consideration and disposition of a particular case by action of the Florida Supreme Court timely and properly invoked.

These procedures are authorized by Article V, Section 4 (2) of the Florida Constitution and by Florida Appellate Rule 2.1-A (5) (a) and (b) and Rule 4.5-c (6), the pertinent portions of which are reprinted herewith in the Appendix to this Reply.

3. In addition, Florida Law requires a Notice of Appeal and the record thereof to be regarded and acted on as a Petition for Certiorari duly presented to an Appellate Court when circumstances require.

Although some attorneys, out of an abundance of caution, will file both a Notice of Appeal and a Writ of Certiorari (Armstrong v. City of Tampa, 118 So. 2d 195), Florida Statutes 59.34 provides, and the courts consistently hold, that an appeal is sufficient by itself. However, the contrary is not true; a Petition for Certiorari may not be treated as a Notice of Appeal (Bartow Growers' Processing Corp. v. Florida Growers' Processing Coop., 71 So. 2d, 165).

Since the question of the construction of the United States and Florida constitution could not be presented to the Supreme Court by Certiorari (Engel v. City of North Miami, 115 So. 2d, 1) and the question of the conflict between the District Court decision and the case of Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed 2d 158, 91 S. Ct. 849, could be reviewed by Certiorari or Certiorari treated as appeal, it was proper to file a Notice of Appeal from the District Courts to the Florida Supreme Court.

4. What constitutes "initially construing" a provision of the Florida or United States Constitution is not clear from the decisions of Florida's Supreme Court.

In Hightower v. Bigoney, 156 So. 2d 501, the Supreme Court held that the District Court of Appeal in 145 So. 2d, 505 construed that portion of Florida's Constitution authorizing a jury trial even though that opinion is based on an analysis of equity procedure and it does not mention the Constitution except in one mention of the Appellant's claim. Similarly, Holbein v. Rigot, 245 So. 2d 57, held that a District Court of Appeal "appears to have construed the full faith and credit provision of the United States Constitution (Sec. 1, Art. IV) in arriving at its

decision," while in the case of Milligan v. Wilson, 104 So. 2d 35, a similar attempt to enforce a foreign judgment was held not to involve construing the Constitution. See also Schermerhorn v. Local 1625 of Retail Clerks Int. Assn., 141 So. 2d 269; State v. Cappetta, 216 So. 2d, 749.

The action of the District Court in the case at bar was no different from the action of the District Courts in the cases where jurisdiction was accepted by the Florida Supreme Court. Therefore it was necessary for Petitioner to exhaust this remedy prior to filing the Petition for Certiorari to the United States Supreme Court.

Petitioner also calls to the attention of the Court, the case of Callendar v. State, 181 So. 2d 529, when the Florida Supreme Court attempted to evade the Mandate of the United States Supreme Court by claiming it was without jurisdiction to follow the Mandate since it had declined jurisdiction of the original Appeal. This Court directed its Writ to the District Court of Appeal, bypassing the Supreme Court, (383, U.S. 270, 86 S. Ct. 924).

CONCLUSION

A Petitioner must exhaust his State remedies before applying to this Court for a Writ of Certiorari. The State remedies include a request to the highest Appellate Court of the State to take jurisdiction, even though that jurisdiction may be discretionary. Petitioner followed this rule in the case at bar. The time for filing the Writ with this Court is measured by the date of the refusal of the Florida Supreme Court to take jurisdiction. Since this Petition was filed within ninety days of that decision, it is timely filed.

RESPECTFULLY SUBMITTED,

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Attorney for Petitioner
1830 Ponce de Leon Boulevard
Coral Gables, Florida 33134

APPENDIX

Florida Constitution, Article V, Section 4 (2)

(2) JURISDICTION. Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The supreme court may directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court. In all direct appeals and interlocutory reviews by certiorari, the supreme court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

The supreme court may issue writs of mandamus and quo warranto when a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency, is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to the trial courts when questions are involved upon which a direct appeal to the supreme court is allowed as a matter of right.

APPENDIX

FLORIDA APPELLATE RULES
Rule 2.1 (5)

(5) **Jurisdiction of the Supreme Court**

(a) Appeals from trial courts may be taken directly to the Supreme Court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees passing directly upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal Constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The Supreme Court may directly review interlocutory orders or decrees passing upon chancery matters which upon final decree would be directly appealable to the Supreme Court. In all direct appeals and interlocutory appeals, the Supreme Court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

(b) Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon the validity of a state statute, a federal statute or treaty, or initially construing a controlling provision of the Florida or federal Constitution. The Supreme Court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, and may issue writs of certiorari to commissions established by law.

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APPENDIX

FLORIDA APPELLATE RULES
Rule 2.1 (5)
(Cont'd)

(c) The Supreme Court or any justice thereof may issue writs of habeas corpus returnable before the Supreme Court or any justice thereof, or before a district court of appeal or any judge thereof or before any circuit judge.

(d) When the jurisdiction of an appellate court has been improvidently invoked, that court may of its own motion or on motion of either party to the cause enter an order transferring it to the court having jurisdiction. Five days' notice of such motion or proposed action shall be given to the other parties. Notices of appeal and other papers filed prior to the transfer shall have the same force and effect as if filed in the proper court and as of the time when filed in the court from which the transfer was made.

(e) The Supreme Court may on its own motion or on suggestion of one of the district courts of appeal issue all writs necessary or proper to the complete exercise of its jurisdiction.

APPENDIX

FLORIDA APPELLATE RULES
Rule 4.5 (6)

(6) **From District Court to Supreme Court.** Where any decision of a district court of appeal (1) affects a class of constitutional or state officers, or (2) passes upon a question certified by such district court to be of great public interest, or (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decision.

APPENDIX

Florida Constitution, Article V, Section 4 (2) (Cont'd)

The supreme court may issue all writs necessary or proper to the complete exercise of its jurisdiction.

The supreme court or any justice thereof may issue writs of habeas corpus returnable before the supreme court or any justice thereof, or before a district court of appeal or any judge thereof, or before any circuit judge.

The supreme court shall provide for the transfer to the court having jurisdiction of any matter subject to review when the jurisdiction of another appellate court has been improvidently invoked.